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Special Needs Trusts to Safeguard Disability Benefits in Personal Injury and Divorce Settlements and Estate Planning

To avoid disqualifying a disabled person from government aid, amounts should not be paid outright to the person or to a trust for his support. Instead, it is best to use a Special Needs Trust.

By Lawrence A. Friedman

People with severe disabilities encounter many obstacles in modern society. While government disability aid can make their lives a little easier, these programs contain tough eligibility requirements and are replete with traps for the unwary. As a result, many disabled people need professional help to obtain or retain benefits.

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It is especially daunting to hire an attorney to pursue a tort or divorce claim or develop an estate plan only to have him needlessly disqualify a client or client's loved one for government disability aid. Yet, lawyers who are not sensitive to these concerns frequently settle cases and draw wills and trusts in ways that jeopardize government benefits.

Fittingly, it is not just the hapless client who suffers from a counsel's malfeasance. More and more, lawyers who do not take account of government disability benefits when representing disabled people and their families are finding themselves on the wrong end of a malpractice claim. As a front-page article in *Lawyers Weekly USA* notes, "Plaintiffs' P.I. [personal injury] lawyers are being sued for malpractice by clients who are losing Medicaid because their recovery wasn't put into a 'Supplemental Needs Trust,' experts tell *Lawyers Weekly USA*. . . . Failure to do so [recommend special, also called supplemental, needs trusts (SNT)] is probably negligence. . . ."¹

Government Benefits for Disabled People

Government disability benefits range from cash assistance to health care, subsidized housing, and social services. Most programs condition eligibility on meeting the Social Security Act standard under which a person is considered disabled only if he cannot engage in any substantial gainful activity due to a medically determinable physical or mental impairment that can be expected to result in death or last for a continuous period not less than 12 months.² Nevertheless, some programs, particularly state aid for people with mental retardation and other developmental disabilities, for example New Jersey's Developmental Disabilities Act, use their own, often

quite different, definitions of disabilities.³ The most common disability benefits probably are Social Security Disability (SSD), Medicare, Supplemental Security Income (SSI), Medicaid, HUD Section 8 housing subsidies, and state social services.

As a component of the Social Security insurance programs, SSD is available to anyone who becomes disabled and has sufficient Social Security employment history. Generally, eligibility and benefits are based on an applicant's personal work history, but sometimes work history of a parent or spouse can be used. Thus, persons who are disabled at birth or in childhood frequently qualify for SSD under the account of a parent. Required work history varies with age and, like Social Security retirement benefits, the particular SSD benefit depends on age, work history, and earnings. SSD becomes effective after an eligible individual has been disabled for six months.⁴

Medicare is provided to individuals who have received SSD for two years. While Medicare covers most mainstream medical care, it does not pay for long-term care. When enrolling in Medicare, individuals may choose from traditional fee-for-service programs or various group options (Medicare HMO). Medicare recipients can face substantial personal health care expenses. Relatively high deductibles and copayments apply to the Medicare fee-for-service program while Medicare HMOs set their own, generally lower, service charges. Normally, Medicare does not provide prescription drug coverage although Congress appears poised to expand Medicare to include this. Some Medicare HMOs have experimented with prescription benefits, but generally have not found them to be profitable.

SSD and Medicare do not discriminate based on finances. Even Bill Gates could qualify for SSD and Medicare if he should become disabled. This is not so with most other disability aid. SSI, Medicaid, and HUD Section 8 housing subsidies are limited to people with modest means. While some state programs are open to everyone with covered disabilities, most base eligibility on financial need or require disabled people who are not poor to pay to participate.

Disabled people with resources below a cap are eligible for monthly SSI cash assistance.⁵ In the year 2000, the federal SSI benefit for single people was around \$500, but most states provided a modest supplement to the federal SSI benefit.⁶ For instance, combined state and federal single SSI benefits are \$543.25 in New Jersey and \$599 in New York.⁷

However, the benefit is reduced by a standard of dollar for dollar of unearned income and fifty cents to the dollar of earned income when income exceeds nominal disregards.⁸ In other words, if a New Yorker, with a \$599 maximum SSI benefit, realizes \$120 in unearned income for May and the first \$20 of unearned income is disregarded, the May SSI benefit will be reduced to \$499. Similarly, if a New Yorker realizes \$165 of earned income and the first \$65 of earned income is disregarded, the benefit will be cut to \$549.

The SSI regulations define income and resources as cash or in-kind assets that can be used to meet an individual's needs for food, shelter, clothing, or items deemed as "support."⁹ Resources are amounts owned at the outset of a month. Amounts received during a month are income, but they become resources if retained to the following month. Many tax-exempt receipts, such as Social Security benefits, gifts, inheritances, child support, divorce property settlements, and litigation recoveries may be income or resources for SSI purposes.¹⁰

In most states, people who qualify for SSI also receive Medicaid. Although Medicaid is often thought of as a federal program, it actually is administered by the states pursuant to broad federal mandates. Federal Medicaid law sets minimum benefit and eligibility standards but permits states to pick and choose from various options.¹¹ In addition to government funded medical care, therapies, and prescriptions, Medicaid pays for long-term care and programs for people with mental retardation. However, because states have great flexibility in designing their Medicaid programs, Medicaid benefits and eligibility requirements vary considerably from state to state. Thus, New Yorkers potentially enjoy very broad Medicaid home care benefits, while New Jersey residents are eligible for more limited home care options.

People who are not eligible for SSI often can qualify for Medicaid under alternative eligibility criteria; although this may result in limited benefits. While income, resource caps, and exemptions differ to some extent from state to state, states must follow SSI eligibility methodology to determine income and resources. Thus, even though a New Jersey resident's countable income must be under \$543.25 to receive SSI, but under \$1,536 to qualify for certain Medicaid long-term care benefits, Medicaid administrators generally must follow SSI rules in determining income and resources.¹²

Although Medicaid and Medicare both fund health care, Medicaid provides much broader benefits. Medicaid covers drugs, long-term care, and other costs for which Medicare normally will not pay. On the other hand, people enrolled in the traditional Medicare fee-for-service program generally have access to a wider array of physicians than Medicaid beneficiaries, as many doctors refuse to accept Medicaid because its reimbursement rates are too low. Individuals who qualify for both Medicaid and Medicare enjoy the best features of both programs. Since Medicaid will pay Medicare deductibles, copays, and cover medicines and other costs outside of Medicare, dual enrollees enjoy the fee-for-service Medicare program's nearly universal access to physicians without having to pay Medicare deductibles and copayments. Consequently, even a disabled person who receives Medicare will suffer if he loses Medicaid.

State housing agencies grant HUD Section 8 housing subsidies to disabled people with limited incomes.¹³ Because subsidies are based on area median incomes, subsidy amounts, rent, and income caps vary from region to region. A Section 8 subsidy equals the excess of allowable rent over a percentage of the disabled person's income. Consequently, as income rises, the subsidy falls. As a result, a lawyer, who resolves litigation in a manner that causes a disabled person to realize income will impair his HUD Section 8 housing subsidies.

Although there are wide disparities in benefits from state to state, typical state benefits include community housing, day programs for people with developmental disabilities such as mental retardation and autism, sheltered workshops, job training, and mental health services. State programs usually limit eligibility based on income and resources or charge disabled people who have an increase in income for benefits they previously received without charge.

Poorly Planned Recoveries and Inheritances Jeopardize Disability Aid

Inheritances and recoveries that cause a disabled person to realize income are likely to be of little value or even prove harmful. SSI benefits and HUD Section 8 housing subsidies are cut as a disabled person's income rises and may phase out completely at relatively modest income levels. Some states require Medicaid recipients who realize income to spend it

on medical care that Medicaid otherwise would cover. In other states, small receipts will not affect Medicaid benefits, but a disabled individual will lose Medicaid entirely if he receives income beyond a modest cap. Losing Medicaid can prove disastrous, since some treatment programs and workshops only accept Medicaid recipients even though a person who does not qualify for Medicaid may be willing to pay privately. Other benefits provided without charge to a disabled person with modest means, such as room and board in a group home, may be available only at a hefty price to disabled people of means.

Under SSI principles, which also govern Medicaid and other programs, outright payment of inheritances and litigation recoveries to a disabled person constitutes SSI countable income because the disabled person can use the payment for his support. This income, which also becomes a resource if not spent in the month received, in turn, triggers cutbacks or elimination of most disability aid.¹⁴

Typical estate tax planning trusts similarly jeopardize government aid because these trusts direct trustees to distribute for a beneficiary's health, education, and support. Under the Social Security Administration's Program Operations Manual System (POMS), which provides internal guidance to Social Security Administration officials, a trust is an SSI countable resource if a beneficiary has authority to revoke and use the trust to meet his needs for food, shelter, or clothing or to direct the trustees to apply the trust for his support.¹⁵ Consequently, a trust for the beneficiary's support is an SSI countable resource because the beneficiary has a legal right to require the trustees to expend the trust for the beneficiary's food, shelter, and clothing. In contrast, the POMS provides that a trust is not a resource where the beneficiary cannot control or revoke the trust and does not have a legally enforceable right to access it for his support.¹⁶

Sometimes estate planners advise clients to disinherit a disabled child in favor of another son or daughter who can spend his inheritance for his disabled sibling. Even though this approach preserves disability aid, it also is ill advised. The nondisabled sibling to whom amounts are diverted may choose not to spend them for the disabled person or may be precluded from doing so due to divorce, disability, death, or financial difficulties. In addition, expenditures for the disabled person may constitute taxable gifts that frustrate the sibling's own estate planning.

Disabled people may be tempted to circumvent government benefit income and resource caps by giving excess resources, such as a large personal injury recovery or inheritance, to others to hold for the disabled person. Unfortunately, most programs temporarily disqualify a donor from benefits. In addition, the same risks apply to these gifts as to disinheritance since the disabled person has no guarantee that the donee will spend the gift as the disabled person wishes.

Special Needs Trusts Preserve Eligibility

To avoid disqualifying a disabled person for government aid, amounts should not be paid outright to the person or to a trust for his or her support. Instead, it would be best to employ a SNT. Federal law explicitly excludes from SSI and Medicaid eligibility determinations amounts held in qualifying SNTs.¹⁷ Although other aid programs do not provide statutory exemptions for SNTs, SNTs often prove helpful to preserve HUD Section 8 subsidies and state social services because SNTs generally are not attributable to the SNT beneficiary.¹⁸

A SNT is a discretionary trust to provide for a disabled person's needs beyond support. It must be governed by a written trust instrument. Because the overriding purpose of a SNT normally is to provide for the disabled beneficiary, the trust instrument usually authorizes trustees to expend the entire trust for the disabled life beneficiary without regard to the interests of remainder beneficiaries.¹⁹

SNT expenditures normally supplement support and, therefore, will not impact eligibility for most kinds of government aid. SNTs commonly pay for necessities to enhance the quality of life such as medical and other professional services, transportation, funeral expenses, and various other lifestyle elements.²⁰ Because enabling legislation generally prohibits Medicaid and Medicare from paying where someone else has responsibility to pay for a disabled person's care, SNTs normally do not pay for basic health care except for extensive dentistry and therapies. Even though Medicaid covers "normal" dental costs, people with developmental disabilities often require far more extensive dental work than Medicaid will fund. SNTs also may be called on to provide speech, physical, and other therapies that supplement Medicaid funded basic health care.

Although a SNT, itself, is not an SSI countable resource, its distributions will be countable income

to the extent they are available to meet the SNT beneficiary's needs for food, shelter, or clothing (i.e., support).²¹ Consequently, SNTs generally are intended for needs beyond support. This model usually works well except when disabled people live on their own in private housing. Family and modest government aid can usually cover clothing, and room and board when an individual lives with family. Similarly, people who live in group homes or institutions normally receive room and board at no charge and can pay for their clothes with SSI or SSD benefits. However, government aid is rarely sufficient to provide desirable housing when living independently.

Therefore, SNTs frequently provide shelter in-kind by purchasing or renting housing for a disabled person. Fortunately, SSI regulations cap the value of income received in-kind at one third the federal benefit rate, plus an additional \$20 if the SNT beneficiary does not receive the in-kind support while living in another person's household.²² Consequently, in-kind income reduces the SSI benefit, but the in-kind income valuation cap keeps in-kind support from disqualifying an individual for SSI and Medicaid. This is true unless he also receives significant cash or investment grade income in addition to in-kind food, shelter, or clothing. For example, where a SNT rents a \$2,000 per month apartment for the disabled trust beneficiary, the beneficiary actually realizes \$2,000 in value. Nevertheless, for SSI and Medicaid purposes, the in-kind income is limited to \$190.67, which is one third the federal SSI benefit plus \$20, since actual value of the in-kind income exceeds the SSI in-kind income valuation cap. This reduces the beneficiary's SSI benefit by \$170.67 to \$190.67. Of course, it is also dependent upon whether the \$20 monthly SSI unearned income disregard already has been applied against other unearned income. This reduction is not large enough to completely eliminate the benefit. By the same token, the in-kind income is less than every state's Medicaid income cap.

So long as a SNT instrument establishes a discretionary rather than a support trust, it generally need not contain any particular language unless the SNT will be self-settled.²³ Nevertheless, it is customary to state that a SNT is intended to supplement rather than supplant government aid. Furthermore, because trust instruments are creatures of state law, lawyers must ensure that applicable state law does not mandate particular provisions to avoid creating

a support trust. In addition, a SNT instrument must address issues that are applicable to all trusts.

Like any other well-drafted trust instrument, a SNT instrument should inform the trustees of the settlor's desires and goals. Otherwise, the trustees will have little to go on in administering the trust. By the same token, a SNT instrument should identify trustees and remainder beneficiaries as well as alternates for both, cover trustee removal and resignation, describe general trustee powers, give investment guidelines, achieve desired tax treatment, authorize informal accountings, waive surety bonds, unless bonding is desired or required by court order, guard against spendthrift, and rule against perpetuities problems.²⁴

When creating a self-settled SNT, the trust instrument must be irrevocable and provide that amounts remaining in trust when the disabled beneficiary dies will be used to repay the beneficiary's Medicaid expenditures.²⁵ The Omnibus Budget Reconciliation Act of 1993 curtailed the use of trusts in nursing home planning by providing that most trusts containing a beneficiary's assets shall be treated as owned by the beneficiary for Medicaid eligibility purposes. However, Congress excluded amounts held in SNTs that satisfy specified treatment of trusts.²⁶ An "A" SNT is a SNT with one beneficiary that commits to repay Medicaid to the extent amounts remain in trust when the beneficiary dies. A "C" SNT is a pooled trust that invests together contributions for many disabled individuals but maintains separate accounts for each beneficiary. A "C" SNT must be maintained by a nonprofit organization, which may retain amounts remaining in trust when a beneficiary dies. Amounts not retained by the sponsor must repay Medicaid in the same manner as an "A" SNT. Some states impose additional requirements on self-settled trusts. Thus, New Jersey has a several-page-long unpublished "checklist" of requirements applicable to self-settled special needs trusts. Pennsylvania requires such trusts to meet certain administrative requirements and limits allowable expenditures.

Under specified treatment of trust, self-settled SNTs must be established by a parent, grandparent, guardian, or court and not by the disabled beneficiary.²⁷ This may create difficulties in some states, as courts may question their authority to establish such trusts and a disabled plaintiff or heir may not have living or cooperative parents or grandparents to manage these trusts. For this reason, the author

drafted a recently enacted law to explicitly authorize New Jersey courts to establish SNTs per the federal Internal Revenue Code (Code) regulations.²⁸ Another option to preserve litigation recoveries is to place them in a pooled trust administered for disabled people by a nonprofit organization per the Code regulations.²⁹ Pooled trusts accounts may be established by the disabled person as well as a parent, grandparent, guardian, or court.³⁰ They are similar to self-settled SNTs except that they invest together the assets of several disabled people while maintaining separate book accounts for each beneficiary. However, because pooled trusts may retain amounts remaining in trust when a disabled beneficiary dies, there is little chance that amounts not expended during the disabled person's lifetime may pass to individual remainder beneficiaries.

When to Employ SNTs

Lawyers should consider SNTs whenever their work may lead to payments for a disabled person since most disability programs are only available to people with limited financial means. Thus, estate planners always should ask clients whether any potential beneficiary has disabilities. Similarly, personal injury lawyers must be sensitive to government benefits considerations when settling claims for disabled people. Although it might seem that family lawyers need not be concerned with SNTs, divorce can trigger alimony, property settlements, or child support for a disabled spouse or child. Because these amounts can constitute SSI countable income or resources, they should be paid into a SNT to avoid jeopardizing financial need-based disability benefits.

SNTs are not needed to preserve eligibility for SSD, Medicare, and other disability benefits that are provided without regard to financial need. Nevertheless, SNTs still may be appropriate because even a disabled person who does not currently get financial need-based aid may need it later. For instance, a disabled adult who currently receives only SSD and Medicare eventually may apply for Medicaid funded long-term care. By the same token, a SNT can protect a minor's potential eligibility for future aid. Few disabled minors receive financial need-based benefits because the SSI rules usually attribute a parent's income to a minor child.³¹ However, if a minor's medical malpractice recovery is paid outright rather than into a SNT, he or she will not be eligible for SSI or Medicaid when income attribution ceases at age 18.

To preserve government aid, a SNT instrument must be drawn in accordance with complex regulations that govern SSI, Medicaid, and possibly other programs. Because most lawyers are not knowledgeable in government benefit law, litigators, family lawyers, and many estate planners retain elder law attorneys to draft SNT instruments.

Tax Considerations

As with other trusts, SNTs also should be designed with tax considerations in mind. Because the Internal Revenue Code does not address SNTs, they are taxed in the same manner as other trusts. Consequently, attorneys have the option to design a SNT so that income is taxable to the settlor, trust, or beneficiary.³² Similarly, SNTs are compatible with most estate and gift tax planning techniques. They can be readily adapted to serve as credit shelter trusts or irrevocable life insurance trusts and can hold shares in family limited partnerships and limited liability companies.

If a SNT is revocable, it normally will be treated as if owned outright by the settlor; although it may be possible to draw the instrument to yield different tax consequences. Thus, payments into a revocable SNT are not gifts for tax purposes, but SNT distributions are gifts from the settlor to the beneficiary.³³ Because SNT distributions are not future interests, they normally are eligible for the annual gift tax exclusion. Irrevocable SNTs can be drawn either to cause payments into trust to constitute gifts for tax purposes or to preclude gifts depending whether the settlor retains authority over the SNT.³⁴ If payments into an irrevocable SNT are not gifts, distributions will be. It generally is risky to give a disabled SNT beneficiary *Crummey* withdrawal rights in order to qualify contributions into an irrevocable SNT for the federal gift tax annual exclusion.³⁵ Although not settled, there is strong reason to believe that the beneficiary can be considered to contribute to the SNT amounts subject to the beneficiary's unexercised *Crummey* withdrawal right. In that case, the SNT may have to provide for Medicaid repayment in compliance with the Code or risk disqualifying the beneficiary for SSI and Medicaid.³⁶

Addressing Liens When Settling Personal Injury Claims

In 1993, Congress amended federal Medicaid law to permit disabled plaintiffs to maintain Medicaid

eligibility so long as personal injury recoveries are paid into a SNT.³⁷ Nevertheless, since Congress sought to help disabled people supplement the Spartan lifestyles afforded by government aid, not provide a windfall to disabled Medicaid recipients' heirs, special needs settlement trusts generally must reimburse Medicaid when the beneficiary dies. However, these Medicaid reimbursement obligations would prove illusory should trustees exhaust a SNT during the disabled beneficiary's lifetime. Consequently, states sought to tap disabled people's settlements to repay Medicaid expenditures that precede the settlement, but advocates for disabled people resisted.

Initially, the courts were sympathetic. An influential line of several New York lower court rulings beginning with *Link v. Town of Smithtown* held that Medicaid liens should be deferred until a SNT beneficiary dies.³⁸ The *Link* court doubted that Congress would mandate immediate repayment of pre-settlement Medicaid expenditures but permit deferral of post-settlement Medicaid liens, particularly since plaintiffs with similar injuries and settlements could have vastly different Medicaid repayment obligations depending on how quickly they settle.³⁹

Former Health Care Financing Administration (HCFA) Medicaid Bureau Director Sally Richardson sought to counter the *Link* line of cases. In a letter to state Medicaid directors, Ms. Richardson concluded that states may access the portion of a personal injury recovery intended to pay a disabled plaintiff's medical expenses, and a plaintiff who diverts a settlement into a SNT rather than repaying Medicaid forfeits Medicaid eligibility.⁴⁰ Agreeing with Ms. Richardson, the New York Court of Appeals reversed *Link* and its progeny in *Cricchio v. Pennisi*⁴¹ and *Link v. Smithtown*.⁴² As of late 2000, the author is not aware of any ruling contrary to *Cricchio* that has not been reversed by a higher court. Consequently, it appears to be settled that a personal injury recovery may be paid into a SNT only after first satisfying pre-settlement Medicaid liens.

In many states, personal injury attorneys are personally liable to ensure that Medicaid is repaid from a disabled person's personal injury recovery.⁴³ Medicare imposes similar liability on trial attorneys to satisfy Medicare claims.⁴⁴ Thus, before paying out any personal injury recovery for an individual who may have received Medicaid or Medicare, a litigator should obtain lien releases from Medicaid and Medicare.

Conclusion

Losing disability aid can prove tragic. Eligibility to receive government aid can determine whether a disabled person barely subsists or enjoys a reasonable quality of life. In some cases, disabled people can access valuable therapies and other opportunities only if they qualify for Medicaid.

Because most government disability programs are limited to people with financial need, outright receipt of a personal injury award, inheritance, or divorce settlement, usually will jeopardize government aid. By employing SNTs when settling claims and planning estates, lawyers can help clients set aside amounts for a disabled person without disqualifying him or her for disability benefits.

Endnotes

1. James L. Dam, *New Malpractice Danger for P.I. Lawyers as a Result of Medicaid*, 96 LAW. WKLY. 677 (July 29, 1996).
2. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.905-.911.
3. N.J. STAT. ANN. § 30:6D-25 (West 2000).
4. SOC. SEC. ADMIN., SOCIAL SECURITY DISABILITY BENEFITS, No. 05-10029 (Sept. 1999) (provides a general overview of the disability program).
5. The monetary limits to qualify for SSI cash assistance are \$2,000 for an individual or \$3,000 for a couple. 20 C.F.R. § 416.1205.
6. See 20 C.F.R. § 416.410.
7. SOC. SEC. ADMIN., A DESKTOP GUIDE TO SOCIAL SECURITY AND SSI WORK INCENTIVES, No. 05-11002 (Jan. 2000).
8. 20 C.F.R. § 416.1100-.1124.
9. 20 C.F.R. § 416.120(c)(2)-(3).
10. 42 U.S.C. § 1396a.
11. 20 C.F.R. § 416.110(a).
12. N.J. STAT. ANN. § 30:4D-3 (West 2000).
13. 42 U.S.C. § 1437(a).
14. 42 U.S.C. § 1382(a).
15. SOC. SEC. ADMIN., SOCIAL SECURITY ADMINISTRATION'S PROGRAM OPERATIONS MANUAL [hereinafter SSA POM], SI. 01120.200.
16. *Id.*
17. 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4).
18. This is a principle enunciated in the SSA POMS SI 01120.200.
19. 42 U.S.C. § 1396p(d)(4)(C).
20. Other such services that are provided include housekeeping, upgrades from basic accommodations, telephone service, personal items, furniture, equipment, supplies, amusements, entertainment, personal and professional services, repairs and maintenance, disability/geriatric case management evaluation and services, legal fees and court costs, such as the cost of proceedings to appoint a guardian, other professional fees, luxuries, training, education, outings, vacations, fuel, travel and transportation, vehicles, costs to make vehicles and facilities accessible, expenditures so that family and friends can visit, and costs of funeral and final resting. 42 U.S.C. § 1382b(a).
21. 26 U.S.C. § 641.
22. 20 C.F.R. § 416.1130-.1148.
23. An example of this language would be whether an amount such as litigation recovery would be legally given outright to the disabled person.
24. 26 U.S.C. § 641.
25. 42 U.S.C. § 1382b.
26. 42 U.S.C. §§ 1396p(d)(4)(A), 1396p(d)(4)(C).
27. *Id.*
28. *Id.*
29. 42 U.S.C. § 1396p(d)(4)(C)(i).
30. 42 U.S.C. § 1396p(d)(4)(C)(iii).
31. 42 U.S.C. § 1382c(f)(2).
32. 42 U.S.C. § 1382b.
33. *Id.*

34. *Id.*
35. *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).
36. 42 U.S.C. § 1396p(d)(4)(A).
37. 42 U.S.C. § 1382b.
38. 616 N.Y.S.2d 171, 175-76 (N.Y. Sup. Ct. 1994), *rev'd sub nom Cricchio v. Pennisi*, 683 N.E.2d 301 (N.Y. 1997).
39. *Id.*
40. Letter from Sally Richardson, former Health Care Financing Administration Medicaid Bureau Director, to state Medicaid directors, (June 5, 1996) (known as the Richardson letter).
41. 683 N.E.2d 301 (N.Y. 1997).
42. 700 N.Y.S.2d 52 (N.Y. App. Div. 1999).
43. Dam, *supra* note 1, at 677.
44. *Id.*